112—271

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 273.

JAMES GRANT, APPELLANT,

vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 25, 1882.

the benefit of his vendee. The courts will not lend their process and power to do that indirectly, or circuitously which the law says shall not be done.

It is, therefore, for these additional reasons set out in this supplemental brief, submitted that the judgment of the Circuit Court should be affirmed.

CHARLES H. TOLL AND
ENOCH TOTTEN,
Counsel for Defendant in Error.

113—21

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1 *Order to Show Cause.*

In the Circuit Court of the United States of the Ninth Judicial Circuit, District of California. In Equity.

JAMES GRANT *vs.* GEORGE H. PARKER.

Upon the filing of the petition in this cause, and the service of copies of the moving papers, and of this order, it is ordered that the defendant show cause, at the court-room of said court, in San Francisco, on the rule day, on the first Monday in April next, or as soon thereafter as counsel can be heard, why the injunction asked for in the prayer of the bill be not granted; and that the defendant be required to furnish the complainant with any affidavits
2 he may wish to use on the application five days before the hearing.

And the complainant agreeing before the judge to take no action as a direction to change the state of business of the company as it was before the passage of the resolutions of the 4th day of January, 1882, complained of in the petition, and upon his depositing with the clerk of the court five hundred dollars, to stand in lieu of a bond for costs and damages which may accrue by the wrongful suing out of said writ, the clerk of the court is directed to issue an order to said George H. Parker to do no act as a director of said company to enforce resolutions Nos. 1, 2, 3, and 4, referred to in said bill, or any of a like nature, and to refrain from voting on said 5660 shares of stock of the Fresno Enterprise Company, which he purchased under the contract referred to in said petition, at any
3 meeting of the stockholders of said company which may be held between this time and the hearing and disposal of said application for an injunction, or to do any other act as a director interfering with James Grant as president and general manager of the mining property referred to in the bill on file in this cause.

Dated March 7, 1852.

(Signed) LORENZO SAWYER,
Circuit Judge.

4 *Bill of Complaint.*

In the Circuit Court of the United States for the District of California.

JAMES GRANT, a Citizen of Iowa, Plaintiff,
vs.
GEORGE H. PARKER, a Citizen of California, Defendant. } Bill in Equity.

To the judges of the circuit court of the United States for the district of California, sitting in equity:

James Grant, who avers that he is a citizen of the State of Iowa, brings this bill in equity against George H. Parker, a citizen of the State of California, and, for cause of complaint, avers:

1. That in the month of November, 1880, George H. Par-
5 ker, acting as the agent of I. E. Bowe and other citizens of California, was engaged in negotiating a sale of a controlling

interest in the shares of stock of the Fresno Enterprise Company, a corporation of California, owning a gold mine in Fresno county, in said State, called the Enterprise mine. The stock of this company was divided into one hundred thousand shares of the par value of fifty dollars each.

Parker at that time was endeavoring to sell a majority of the shares, first at four dollars, and after three dollars, per share, and exhibiting specimens of the ore of said mine to various citizens of Davenport, Iowa, where the plaintiff resides. He solicited the petitioner to take a large interest in said property. The said petitioner, Grant, told Parker that his mine might be a very good one, but that Grant was able to own a mine himself, and that he
6 would not buy an interest in any mine that he could not control. Parker said, it will be controlled in Davenport. Grant replied, I do not mean that; I mean that I must control it as if I owned it. Parker did not then assent to Grant's terms at that time. The petitioner shortly after left Davenport, and passed the winter in Boston, at the Mass. School of Technology, studying chemistry and metallurgy of mines.

The petitioner is a man of large estate, and had made a great deal of money in Colorado, in the reduction of ores at Leadville, in connection with his nephew and adopted son, James B. Grant. It was a matter of great interest to Parker to enlist the plaintiff in his enterprise, and without doing so he was unable to sell a majority of the shares of said stock. The petitioner returned from Bos-
7 ton in the latter part of April, 1881, and about the 1st of May, 1881, he was again approached by Parker, and solicited to take an interest in said mine. The petitioner told Parker that he would not take an interest in the best mine in the world, unless he could control it as if he owned it. To this condition Parker assented, and on the same day made it known to Thomas I. Robinson, of Rock Island, Illinois, where he had been soliciting to take stock in said mine. Robinson had previously declined, but, as petitioner is informed, told Parker that if said Grant was to control the management he would invest as much as thirty thousand dollars in the stock. Parker and Robinson, on the next day, 2d May, 1881, met Grant in his office, in Davenport; and, upon Grant's again repeating his conditions, Parker agreed to them, and appointed the
8 next day, 3d May, 1881, to meet the petitioner at the office of Hon'l J. R. Doolittle, in Chicago, with other parties, who were to join in the purchase, Grant being authorized by Robinson to take as much as thirty thousand dollars in said stock for him.

The meeting was held in Judge Doolittle's office, at which were present Parker, Doolittle, Kelly, Wood, John D. Parker, McCormick, and A. E. Campbell. At this meeting the petitioner repeated the conditions on which he would take an interest in said stock; and, among other things he stated that the laws of California made the directors and stockholders of such corporations responsible for the acts of their associates, and Mr. Abner Davison, an attorney of Davenport, had declined to take stock in this company for that

reason. Grant said he proposed to protect himself against such laws by retaining the control of the property. In all the negotiations Parker proposed to be a purchaser with Grant & others to the amount of fifteen thousand dollars, and at this meeting in Chicago a contract, of which the following is a copy, was executed between the petitioner and George H. Parker and others:

"CHICAGO, *May* 3, 1881.

To the gentlemen who may assent to the contract herein named:

At the request of Geo. H. Parker, who has an offer of the majority of the stock of the Fresno Enterprise Mine in California, and which is offered for sale at $3.00 per share, the capital being one hundred thousand shares of the par value of fifty dollars per share, I propose, as soon as I can go to Leadville, say 25 May, 1881, to examine the said mine personally, and, if I conclude to purchase a majority of the shares, I will unite with you in the purchase, and I will take from ten thousand to sixteen thousand shares, thirty to fifty thousand dollars, on my own account. You gentlemen who join me in the purchase can take the balance of a majority of the stock, but there is to be a distinct understanding and agreement that I am to control the management of the mine. And if you gentlemen wish at any time to transfer your interest, you must give me the option of purchasing at your price, or have a stipulation that I am to continue in the management. I stipulate not to sell my interest without giving you a like option.

(Signed) JAMES GRANT."

On the back of this paper is indorsed the following:

James Grant	will take		$50,000
George H. Parker	"	"	$15,000
David Kelly	"	"	10,000
George E. Wood	"	"	10,000
C. E. Healey, by George H. Parker,	will take		10,000
John D. Parker	"	"	5,000
A. E. Campbell	"	"	1,500
A. M. Eddy, by A. E. C.,	"	"	1,500
W. H. Ferry	"	"	1,500
T. I. Robinson	"	"	30,000
J. R. Doolittle or Judge Grant	"	"	6,000
C. M. McCormick	"	"	5,000
H. H. Anderson	"	"	3,000
H. Lischer	"	"	3,000

These endorsements were made on that day. The next day, on I. Grant's return to Davenport, and with the approval of T. I. Robinson, the following indorsements were made. The undersigned will take of T. I. Robinson's subscription:

James T. Lowe	3,000
Charles Tierny, by H. H. Andrew	1,500
Charles Proctor	900
Louis Hansen	600

Afterwards, about the 25 May, 1881, the petitioner, with Thomas

I. Robinson and J. R. Doolittle, met George H. Parker, I. E. Bowe, and John Haley, one of the owners, at the mine, examined the same, and concluded to make the purchase; went to San Francisco,
12 and there met John Haley, W. F. Myers, and H. T. Fairbanks who were the sellers of the majority of the shares of the said stock. During all the negotiations, and up to the sale of the shares to your petitioner and his associates, now called a syndicate or combination of purchasers, George H. Parker, as agent for Bowe & the sellers, represented to your petitioner that none of the shares of stock in said corporation could be bought for less than three dollars per share; but said Bowe for himself, or himself and Parker, as soon as it became probable that your petitioner and syndicate might purchase a majority of said shares unknown to your petitioner, purchased of one John Sheehy twenty-one thousand shares of said stock at the price of one dollar and a quarter per share. Before the consummation of the purchase various interviews were held be-
13 tween your petitioner, Doolittle and Robinson on the one side, and George H. Parker, Bowe, Haley, Myers, and Fairbanks on the other, and when the petitoner and his party gave notice of the intended purchase, Grant said to Fairbanks, Myer, Bowe, Parker, and Haley, "Now, gentlemen, if we purchase this stock it is distinctly understood that the management is to change and that I am to be the manager." To which Fairbanks, speaking in the presence of the rest, said "Yes, and we will resign as directors and elect such persons as you may name." To this, Grant said "Resignation is not necessary, as the regular election comes off next week."

Thereupon, about the last of May, 1881, the bargain was concluded and a majority of the shares in the corporation were transferred to the members of the syndicate of purchasers by Haley, Myer,
14 and Fairbanks, through W. H. Allen, secretary and trustee for the sellers:

To James Grant seventeen thousand shares	17,000
To David Kelly, of Chicago, Ill's	3,334
George E. Wood, " "	3,333
A. E. Campbell, " "	1,500
W. H. Ferry, " "	500
John D. Parker, " "	1,666
C. M. McCormick, " "	1,667
James R. Doolittle, " "	2,000
H. H. Anderson, Davenport	1,000
H. Lischer, "	1,000
James T. Lane, "	1,000
Christian Loerring "	500
Louis Hanson, "	200
Charles Preston, "	300
James Thompson "	592
George H. Parker, "	5,660
Charles E. Cutten, Ohio	4,013
Thomas I. J. Robinson, Rock Island	5,335
Total	51,000

That being the division made by the parties under the syndicate contract of 3 May, 1881. On each one of the certificates of stock so purchased was endorsed, This certificate is subject to a contract with James Grant of 3d May, 1881.

15 The certificates cancelled and the certificates issued to the purchasers all had the words, To abridgement for trustee, in the body thereof, without naming the real owner in the certificate or on the books of the company. In answer to an inquiry by the petitioner "why was this," it was said "to keep people from knowing who are the stockholders." Your petitioner afterwards hearing that this was a direct violation of law, carried his and other syndicate certificates to be reissued in compliance with the laws of California.

On the following Wednesday, the annual election day, with the approval and vote of the syndicate and Bowe, Mayer, Fairbanks, and Haley, elected as directors James Grant, Thomas I. Robinson, and George H. Parker to represent the syndicate contract, and Bowe and Myers as representatives of the minority interest.

16 Grant was by the whole board of directors elected president. M. T. Goodfellow, on his recommendation, elected superintendent, and a unanimous resolution of the board of directors made Grant, in pursuance of the syndicate contract, general manager of the mine. An assessment of fifteen cents per share was levied to build a stamp mill with ten stamps. Grant, by written order to Goodfellow, directed him to proceed with the execution of the mill, while Grant was to be gone about a month to arrange his business to take personal charge of the mine.

2. Bowe and Parker both kindly volunteered to go to the mine while Grant was absent and assist Goodfellow in his duties. They went. Bowe practically represented Goodfellow, took charge of everything, altered Grant's plans without consulting him,

17 and when Grant returned volunteered to keep the charge by inviting Grant to send Goodfellow to the mine, and Grant to go away and rest himself, and Bowe would manage the rest of the business. This offer was not accepted. Parker, as Bowe's agent, had in the meantime sold to parties East several thousand shares of the Sheehy stock at from three to five dollars a share on the faith of false representations by Parker of the opinion of Jas. B. Grant, as to the value of the mine, and to J. B. Grant himself one thousand shares at 4.90 per share, and then withdrew further sales of the stock from the market. When George H. Parker & Bowe discovered, on J. Grant's return to the mine, in July, they began to manifest dissatisfaction with everything he did. They both requested of Grant to remove Goodfellow as superintendent,

18 and Parker had a personal disputation with him because the mine was not producing as much as it formerly had.

Your petitioner regarded the location of the principal office of the company at San Francisco, over two hundred miles from the mine, as a great inconvenience to him, and suggested to Bowe, Parker, Haly, Myer, & Fairbanks, and the syndicate, a change. This required the assent of two-thirds of the stockholders. All the members of the syndicate assented in writing, except George H. Parker

and Charles E. Crittenden, whom Parker represented. Parker at first temporised, promising to go with a majority of the syndicate, but when your petitioner presented him with their written approval, and their proxy to cast their votes at all meetings of the stockholders, Parker refused to sign either.

19 During the progress of the work on the stamp mill your petitioner found that the cost far exceededed the estimates furnished him by Bowe & Haley, increased in said manner by Bowe's change of his plans, and your petitioner had to advance large sums of money to complete the work and keep up the prospect work in the mine. For his own convenience, and in full compliance with the authority vested in him by the resolutions of the board of directors and the by-laws, he ordered the accounts to be kept at the mine, and regularly, with proper vouchers, returned to the principal office in San Francisco. The vice-president of the company, W. F. Myer, contrary to the by-laws, assumed to himself the right to sign the checks of the corporation & issue certificates of stock whenever your petitioner, in the discharge of his duties, was out of the city of San Francisco, though by the by-laws the

20 vice-president could only act when the president was "unable to act," & in such case he become acting president, & could assume the whole duties of the president.

Your petitioner made a positive order that the treasurer should pay no checks, except those signed by himself, and that no certificates of stock should be issued to a trustee unless the name of the real owner was inserted in the certificate and placed on the books of the company.

These orders gave great offense to Bowe, Myer. About the 22 of September said defendant, George H. Parker, who was at the mine, and who had refused a direct application of your petitioner to consent to the transfer of the principal office, and to give him his proxy, left the mine in company with I. E. Bowe.

On the 24 of September the said George E. Bowe, a director

21 in said Fresno Enterprise Company, sold to George H. Parker, also a directior, five thousand shares of the stock which Bowe had purchased of Sheehy at the price of one dollar and twenty-five cents a share, though Bowe, through Parker, had been selling said shares at five dollars per share, and had withdrawn from the market further sales at that price. Your petitioner had previously ordered the secretary to send to him at the mine a blank check-book, and Bowe & Myer & Parker, without any board meeting, countermanded said order.

On the 26 of September, 1881, acting in concert with Bowe and Myer, addressed a letter to your petitioner, of which a copy is hereto annexed & marked Exhibit A, in which, among other things, he says:

"I am surprised at the powers you assume as president and general manager—

22 1. In delegating authority to the superintendent to sign checks upon the Bank of California, the treasurer of the company.

2. Ordering the secretary to send you his check-book, which he is required to keep in his office as part of the records of the company.

3. In notifying the secretary not to issue certificates of stock signed by the vice-president, when you were absent.

In regard to your notice to the bank not to honor the checks signed by the vice-president, you say they will probably follow your instructions as you furnished the money. I suppose you intended to loan the money to the company for a rate of interest to be agreed upon and make it a regular business transaction, or I should not have allowed a dollar of it to be used.

23 Your course is going to involve us in difficulty, as you are assuming powers to act independent of a board of directors, and placing your own construction upon the written agreement of the syndicate, intimating that I am bound by your interpretation. You assume that I have no interest as a stockholder or director that I can protect. I cannot assent to your views of my rights under the syndicate, and have therefore expressed my willingness to meet with the board of directors at the regular meeting, which is on the 5 of October, 1881, by a provision of the by-laws, or a special meeting sooner if you decline to meet your business engagements East. I am in hopes at such meeting that we may come to an amicable understanding as to your powers and duties as general manager and president."

24 On the same day and by same mail your petitioner received from Allen, secretary, a notice of the special meeting, and that he had been ordered by the directors not to deliver to the petitioner the check-book.

Your petitioner not knowing that on the 24 of Sept. Bowne had given to Parker a bonus of $18,750 on the sale of the five thousand shares of stock, on the 28 of September, 1881, replied to Parker's letter of 26, a copy of which is annexed, marked Exhibit B, in substance as follows: "I have not delegated authority to the superintendent to sign checks on the Bank of California, the treasurer.

The by-laws of the company make it my duty to sign all certificates of stock and all contracts, and checks when signed and delivered are contracts. Before that they are blank pieces of paper. To

25 save the holders of orders of the sup't from the trouble of sending them to me to get checks for them, I authorized the bank to pay them, which I had a right to do as the manager of the property.

I did order the secretary to send me a blank check-book, because it is my duty to sign and issue checks, and not his, and I supposed you had sense enough to know, and I do suppose so now, when you have your senses, that a blank check-book is no more a record than this piece of paper, with the heading of the company.

3. I notified the secretary not to issue certificates of stock signed by the vice-president when I was able to do it myself. You know that the laws require the secretary to attend the principal office certain hours every day, but does not require the president to be there

at all, and he is not absent as president when he is not in his office.

26 My course will involve no one in any difficulty, except men who seek to violate their contract with me, which was, that if I approved we were to purchase a majority of the stock of this mine with the 'distinct understanding and agreement that I was to have the control of the management of the mine,' and if they transferred their stock it was to be subject to that contract.

Your name is signed to that paper. I am carrying out its provisions, and the first act I thought proper to be done to protect my interest and yours. You alone refuse to perform of the many who signed it. The contract is so plain that it requires no interpretation. To induce me to put three times as much money in this property as you did, you signed that paper, knowing full well that a directory was to be selected to carry out my opinions, and

27 after you have signed that contract, and been elected a, di- to fulfil it, you are seeking to evade it. You knew what it meant. I told you not once, but three times. I would not put a dollar in this mine if I could not control it as if it were not my own. I have invaded no right of yours as a stockholder or director. You are seeking to avoid your contract as a stockholder with me, which gave me the control of this property."

Your petitioner avers that in compliance with the syndicate contract, in the faith of which he purchased his interest in the mine, the board of directors at their first and only full meeting, at which he was elected president, on the first Wednesday of June, 1881, unanimously passed a resolution "That the president of this company be appointed the general manager of the mining prop-

28 erty of this corporation."

When your petitioner received the letter of the defendant of 26 of September, 1881, he was acting in strict compliance with the laws of the State and the by-laws of the corporation. A copy of which by-laws are annexed to and made part of this bill, marked Exhibit C.

Article 7, defining the powers and duties of the president, reads:

"President. The board of directors shall at their first meeting elect one of their number to act as president, and if any time the president is unable to act the vice-president shall take his place and perform his duties, and if at any time the vice-president shall from any cause be unable to act they shall appoint some other member of the board to do so, in whom shall be vested all the duties and functions of the office.

29 The president, or in his absence, the director appointed as above provided, shall preside at all meetings of the stockholders and directors.

2. He shall sign as president all certificates of stock and all contracts and other instruments of writings, which have been first approved by the board of directors, and affix the corporate seal to all instrumets requiring a seal.

3. He shall call the directors together whenever he deems it nec-

essary, and shall have, subject to the advice of the directors, direction of the affairs of the corporation, and generally shall discharge as may be required of him by the by-laws of the corporation."

When Parker gave your petitioner notice of the meeting referred to he knew that Robinson, a director at Rock Island, could not be notified, and that if he, Parker, attended a regular
30 meeting, and made a quorum with Bowe & Myer, they could rename your petitioner as general manager. Every act of your petitioner complained of by Parker was in strict compliance with the laws of California and the by-laws of the corporation. Your petitioner, on receiving Parker's letter of 20 Sept., at the mine, came to San Francisco and made a written demand of Parker if he intended at the proposed meeting to interfere with the petitioner as general manager of the property, and receiving no answer thereto, he, on the 4 of October, 1880, filed in this court a petition against Parker, Myer, and Bowe, seeking to restrain them from the violation of the contract with Parker, & the terms on which he purchased, to which they, as stockholders, assented. A time was set for hearing the injunction, and a preliminary
31 restraining order granted by Judge Hoffman, which was served on Myer & Parker, and thereupon Parker, Bowe, & Myer all signed an answer that they did intend at such meeting to interfere with your petitioner as the manager of the property, and by consent his bill was dismissed without prejudice, and your petitioner supposed that any further interference with him as manager of the property under contract of 3 May, 1881, was abandoned.

3. But the said George H. Parker immediately after went to Iowa and Illinois and sought to induce other members of the syndicate to violate their contract.

He stated to them that he had the opinion of an eminent lawyer of California that the contract he and they had made with your petitioner of 8 May, 1880, was void; that your petitioner
32 was extravagant in his management; that he was habitually violating the laws of California and the by-laws of the company. In December, 1881, he was joined in these representations by I. E. Bowe, and they induced some members of the syndicate, on the faith of these statements, to approve of certain resolutions, hereafter referred to, agreeing to submit said resolutions to your petitioner for approval before passing them. This was about 21 December, 1881. The said George H. Parker returned to San Francisco in a clandestine manner, having represented to H. H. Anderson, a member of the syndicate, that he was going to Chicago, and then he did not know where he was going. His name was not on the list of passengers daily published as intending to arrive at San Francisco; and he and Bowe, instead of presenting said resolutions to your petitioner, as they had agreed with the signers, or
33 some of them, in Chicago, left them at the secretary's office.

Your petitioner accidentally saw both Parker & Bowe in San Francisco on the 3d of January, conversed with them about the mine and his business, but neither of them mentioned said resolutions or any intention to pass any such resolutions or remove the

superintendent at the regular meeting on the next day; and when they met on the next, and the secretary told them your petitioner was in the city, & asked if he should be notified, they told no; that your petitioner knew it was the regular day for the board meeting.

On the 4 January, 1884, the said George H. Parker at the said meeting aided and assisted in passing the following resolutions, all of which were intended to vex and annoy your petitioner in discharge of his duties, the first four of which were direct vio-
34 lations of the by-laws of said company, and the balance violations of the contract of Parker with your petitioner, except the one in relation to lawsuits. Copies of these resolutions are annexed and made a part of this bill, marked Exhibit C. The first resolution prohibited the treasurer from paying any checks unless signed by the president or vice-president, and countersigned by the secretary, at the office in San Francisco.

The second resolution required all orders for supplies and material from San Francisco, to be made through the head office in San Francisco, and paid for by check signed by the president or vice-president, and countersigned by the secretary, at the office in San Francisco.

The third resolution authorized the vice-president, in case of absence of the president from the office in San Francisco, to
35 sign all certificates of stock that are legally issued by the secretary, as well as all papers requiring the signature of the president if he were present at the office.

The fourth resolution provided that in the absence of the president from the mine, the superintendent at the mine should draw drafts on the company at San Francisco for all indebtedness accruing at the mine.

These resolutions were violations of by-law 7 and by-law 10, which give the president alone power to sign contracts and certificates of stock. When the president signed & delivered a check it was a completed contract in which the corporation could be used, & did not require the countersign of the secretary at the office in San Francisco.

The board had no power under by-law 7 to authorize the vice-president to sign certificates of stock, or checks, or other
36 papers requiring the signature of the president, because the president was not in the office at San Francisco. The president was just as able to act in all such cases as if he were in the office. Until he was "unable to act" the board could confer no power on the vice-president, and when the president was unable to act, the vice-president, by the law & not by the action of the board, took his place and performed his duties.

The board had no power under the by-law to authorize the superintendent at the mine to draw checks or drafts on the company for indebtedness accruing at the mine. The by-laws required the president to sign all contracts, and the board of directors could not by a resolution change the by-laws. The power to do that is vested in the stockholders.

37 The said Parker, at said meeting, also aided in passing a fifth resolution, that in important changes or improvements at the mine or works involving expense, outside of the regular working of the mine and the operating of the mill be incurred, without being first acted upon and approved by the board of directors, and also without the knowledge of your petitioner, and without advising with him in relation thereto, a resolution removing M. F. Goodfellow as superintendent of the mine, when he knew said Goodfellow was acceptable to your petitioner as the manager of the property.

These acts of said Parker were violations of his contract with your petitioner of 3 May, 1881, whereby it was stipulated that if your petitioner should conclude to purchase a majority of the shares in said corporation he would unite with Parker and the
38 other parties in the purchase; that he would take from ten to sixteen thousand shares on his own account, and Parker & others could take the balance of a majority of the stock, with a distinct understanding and agreement that your petitioner was to control the management of the mine.

The said defendant sometimes gives out and pretends that he understood the contract differently from what it reads; that proxies given in pursuance of said contract can be recalled at pleasure; that he is not compelled to give your petitioner his proxy; that as a director in the corporation he has assumed a trust which he cannot violate, he sometimes pretends that his contract as a purchaser is void because a director or trustee cannot make such a contract.

All which is a mere pretense: the said Parker made said
39 contract as a purchaser before he was elected a director, a position which he voluntary assumed and now seeks to make an excuse for violating a contract executed by him before he became a director.

The said defendant in November last, in the city of Chicago, approached John V. Farwell, a man of wealth and influence, and a holder of nearly five thousand shares of the stock of the Fresno Enterprise Company, and said to him, in the presence of other parties: "I want it understood here and now, that, as a director in the Fresno Enterprise Company, I propose to manage its affairs according to your wishes," or words to that effect.

All which actings and doings of the said defendant, George H. Parker, are contrary to equity and tend to the injury of the
40 petitioner, for which there is no adequate remedy at law.

The value of the property in controversy exceeds five hundred dollars.

In consideration whereof, and forasmuch as your petitioner has no adequate remedy at law, he prays for a writ of subpœna to be issued from this court, directed to said George H. Parker, commanding him to be and appear before the court at a time therein named, and answer all the allegations of this bill in as full and ample a manner as if proposed by special interrogatory, but not under oath, which is waived.

That a temporary injunction may be issued to said Parker restraining him from using his power as a director in said Fresno Enterprise Company to violate his contract with your petitioner giving him the control of said inuring property.

41 That he be restrained as a director from attending any meeting of the board of directors, to enforce resolutions one, two, three, and four of the 4 January, which give the vice-president authority to sign checks or certificates of deposit, when your petitioner is not in the city of San Francisco, or which authorize the superintendent to draw drafts on the company when your petitioner is not at the mine.

That he be restrained from voting on said five thousand six hundred and sixty shares of stock issued to him under the contract of 3 May, 1881, or any other shares of stock owned by him, at any meeting of the stockholders for electing directors or amending the by-laws; that on the final hearing said injunction be made

42 perpetual, and your petitioner be directed to have continuing proxy for said five thousand six hundred and sixty shares.

That prior to the hearing of said application for a preliminary injunction, an order be issued from the court prohibiting said Parker in the mean time from enforcing, or aiding to enforce, said resolutions one, two, three, and four, which violate the by-laws of the company in giving power to the vice-president to sign certificates of stock & checks, and the superintendent to draw drafts on the company.

And upon the final hearing of the bill the plaintiff prays that said injunction may be made perpetual, and for such other and further relief as the equity of the plaintiff's case may require.

R. B. WALLACE, *Of Counsel.*
WALLACE & HASTINGS,
Solicitors.

43 United States Circuit Court for the District of California.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

James Grant, being first duly sworn, deposes and says: That he is the plaintiff in the above action; that he has read the foregoing bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters he believes it to be true.

JAS. GRANT.

Subscribed and sworn to before me, this 6th day of March, 1882.

Subscribed and sworn to before me, this 6th day of March, A. D. 1882.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Dis't of Cal'a.

44 EXHIBIT A.

Copy of Letter, George H. Parker to James Grant.

OFFICE OF FRESNO ENTERPRISE COMPANY,
306 PINE ST., ROOM 9, SAN FRANCISCO, *Sept.* 26, 1881.

Hon'l. JAMES GRANT, *President Fresno Enterprise Co.*

MY DEAR SIR: Yours of the 23 inst. received. I am surprised at the powers you assume as president and gen'l manager—

1st. In delegating authority to the superintendent to sign checks upon the Bank of California, the treasurer of the company.

2d. Ordering the secretary to *to* send you his check-book, which he is required to keep in his office as a part of the records of the company.

3d. In notifying the secretary not to give certificates of stock signed by the vice-president when you are absent.

45 In regard to your notice to the bank not to honor the checks signed by the vice-president, you say they will probably follow your instructions, as you furnished the money. I suppose you intended to loan the money to the company for a rate of interest to be agreed upon, and make it a regular business transaction, or I should not have consented to have a dollar of it.

Your course is going to involve us in difficulty, as you are assuming powers to act independent of a body of directors, and placing your own construction upon the written agreement of the syndicate, intimating that I am bound by your interpretation. You assume that I have no interest as a stockholder or director that I can protect.

I cannot assent to your view of my rights under the syndi-
46 cate, and have, therefore, expressed my willingness to meet with the board of directors at the next regular meeting, which is on the 5 day of October, 1881, by a provision of the by-laws, or a special meeting sooner, if you desire, to enable you to meet your business engagements East. I am in hopes at such a meeting we may come to an amicable understanding as to your powers and duties as general manager & president.

Very respect., yours, GEO. H. PARKER.

EXHIBIT B.

Copy of Letter of T. Grant, 28 Sept., to Geo. H. Parker.

FRESNO FLATS, CAL., *Sept.* 28, 1881.

GEO. H. PARKER, Esq., *Lick House, San Francisco.*

DEAR SIR: I have your letter of 26. I have not dele-
47 gated authority to the superintendent to sign checks upon the Bank of California, the treasurer. The by-laws make it my duty to sign all certificates of stock and all contracts; and checks, when signed and delivered, are contracts. Before that they are blank pieces of paper. To save holder of orders from the trouble of

sending them to me to get checks for them, I authorized the bank to pay them, which I had a right to do, as the manager of the property. I did order the Sec. to send me a blank check-book, because it is my duty to sign & issue checks, and not him, and I supposed you had sense enough to know, and I do suppose so now, when you have your senses, that a blank check-book is no more a record than this piece of paper with the heading of the company.

3. I notified the secretary not to issue certificates of stock signed by the vice-president when I was able to do it myself. You
48 know that the law requires the Sec. to attend at the principal office certain hours every day, but it does not require the president to be there at all, and he is not absent as president when he is not in the office.

I did notify the bank not to pay checks signed by the vice-president, because I am the person to sign and because I lend the money or borrow on my own credit to pay them, and you have consented in writing that I should do all this. My course will involve no one in any difficulty, except men who seek to violate their contracts with me, which was that, if I approve, we were to purchase a majority of the stock of this mine with the distinct understanding and agreement that I was to have the control of the management of the mine, and if they ——, then that it was to be subject to
49 that control. Your name is signed to that paper. I am carrying out its provisions, and the first act which I thought proper to be done to enable me to protect my interest & yours you alone refuse to perform of the many who signed it. The contract is so plain that it requires no interpretation. To induce me to put three times as much money in this property as you did, you signed that paper, knowing full well that a director was to be elected to carry out my opinions, and after you have signed that contract and been elected a director to fill it, you are seeking to evade it.

You know what I meant. I told you, not once—but three times—I would not put a dollar in this mine if I could not control it as if it were mine. I have invaded no right of yours as a stockholder or as a director.

You are seeking to avoid your contract as a stockholder
50 with me, which gave me the control of this property. It is charity to think that you are sincere on the subject. I will be in San Francisco Monday afternoon.

Your ob't se'v't, JAMES GRANT.

EXHIBIT C.

By-Laws of the Fresno Enterprise Company.

The name of this corporation shall be the Fresno Enterprise Company.

Article I.

Corporate Powers.—The corporate powers of this corporation shall be vested in a board of five directors, who shall be stockholders, hold-

ing one or more shares of stock, in their own names, in the books of the corporation, and three shall constitute a quorum for the transaction of business.

51 Article II.

Election of Directors.—The directors shall be elected by ballot, at the annual meeting of stockholders, to serve for one year and until their successors are elected. Their term of office shall begin immediately after their election.

Article III.

Vacancy.—Vacancies in the board of directors shall be filled by the other directors electing some stockholder to the office so made vacant, and such person shall hold office until the first meeting of the stockholders thereafter.

Article IV.

Power of Directors.—The directors shall have power: 1. To call special meetings of the stockholders when they deem it necessary, and they shall call a meeting at any time, upon the written request of stockholders holding one-third of the capital stock.

52 2. To appoint and remove at pleasure all agents and employees of the corporation, prescribe their duties, fix their compensation, and require from them security for faithful service.

3. To conduct, manage, and control the affairs and business of the corporation, and to make rules and regulations, not inconsistent with the laws of California and the by-laws of this corporation, for the guidance of the officers and the management of the affairs of the corporation.

4. To incur indebtedness. The terms and amount of such indebtedness shall be entered on the minutes of the board, and the note or obligation given for the same, signed officially by the president and secretary, shall be binding on the corporation.

Article V.

Duties of the Directors.—It shall be the duty of the di-

53 rectors: 1. To cause to be kept a complete record of all their minutes and acts, and of the proceedings of the stockholders, and present a full statement at the regular annual meeting of the stockholders, showing in detail the assets and liabilities of the corporation and generally the condition of its affairs. A similar statement shall be presented at any other meeting of the stockholders when thereto required by persons holding one-half of the capital stock of the corporation.

3. To declare dividends out of the surplus profits when such profits shall, in the opinion of the directors, warrant the same.

3. To supervise all officers, agents, and employees, and see that their duties are properly performed; to cause to be issued to the stockholders, in proportion to their several interest-, certificate of

54 stock, not to exceed in the aggregate five millions of dollars.

4. The board of directors shall meet regularly at the office

of the company on the first Wednesday of every month, at one o'clock, for the transaction of the business of the company.

Article VI.

Officers.—The officers shall be a president, vice-president, secretary, and superintendents, which officers shall be elected by, and hold office at, the pleasure of the board of directors.

The Compensation and Tenure of the Board of Directors.—The compensation and tenure of office of all officers of the corporation (other than directors) shall be fixed and determined by the board of directors.

Article VII.

President.—The board of directors shall, at their first regular meeting, elect one of their number to act as president; and if at any time the president shall be unable to act, the vice-president
55 shall take his place and perform his duties; and if the vice-president, from any cause, shall be unable to act, they shall appoint some other member of the board to do so, in whom shall be vested, for the time being, all the duties and functions of the office.

The president, or in his absence the director appointed as above provided—

1. Shall preside over all the meetings of the board of directors.

2. He shall sign as president all certificates of stock, and all contracts and other instruments in writing which have been approved by the board of directors, and affix the seal of the corporation to all instruments requiring a seal.

3. He shall call the directors together whenever he deems it necessary, and shall have, subject to the advice of the directors, direction of the affairs of the corporation, and generally shall discharge
56 such other duties as may be required of him by the by-laws of the corporation.

The president or two of the directors may call special meetings of the directors at any time, and notice of such called meeting shall be given by leaving a written or printed notice at the last known place of business or residence of each director. Such service of notice shall be entered on the minutes of the corporation, and the said minutes, upon being read and approved at a subsequent meeting of the board, shall be conclusive upon the question of service.

Article VIII.

Secretary.—The board of directors shall elect a secretary.

1. It shall be the duty of the secretary to keep a correct record of the proceedings of the corporation and of the stockholders.

2. He shall keep the corporate seal of the corporation and
57 the book of blank certificates of stock, fill up and countersign all certificates of stock issued, and make the corresponding entries on the margin of such book on such issuance.

3d. He shall keep a proper transfer-book and a stock ledger in debit and credit form, showing the number of shares issued to and

transferred by any stockholder, and the date of such issuance and transfer.

4. He shall keep proper account-books and discharge such other duties as pertain to his office and as are prescribed by the board of directors.

5. The secretary shall serve all notices required either by law or the by-laws of the company; and in case of his absence, inability, refusal, or neglect to do so, then such notice may be served by the president or vice-president of the company.

Article IX.

Books and Papers.—The books and such papers as may be placed on file by the vote of the stockholders or directors shall at all
58 times in business hours be subject to the inspection of the board of directors and of any other stockholders.

Article X.

Certificate of Stock.—Certificate of stock shall be of such form and device as the board of directors may think, and each certificate of stock shall be signed by the president and countersigned by the secretary, and express on its face the number, date of assignment, the number of shares for which, and the person to whom it is issued. The certificate-book shall contain a margin on which shall be entered the number, date, numbers of them, and the name of perperson expressed in the corresponding certificate.

Article XI.

Transfer of Stock.—Shares in the corporation may be transferred at any time by the holders thereof, or by attorney legally con-
59 stituted, or by their legal representatives, by endorsement on the certificate of stock; but no transfer shall be valid until the surrender of the certificate and acknowledgment of such transfer on the books of the company. No surrendered certificate shall be cancelled by the secretary before a new *certificate shall be issued by the secretary before a new* one is issued in lieu thereof, and the secretary shall preserve the certificate so cancelled as a voucher. If, however, a certificate shall be lost or destroyed, the board of directors may order a new certificate to issue upon such guarantees by the party claiming the same as they may deem satisfactory. No stock can be transferred on the books of the company during two days prior to the annual election.

Article XII.

Meetings.—The annual meeting of the stockholders shall
60 be held in San Francisco on the first Wednesday of June, at one o'clock in each year, and shall be called by a notice published in one or more newspapers published in the city and county of San Francisco, as the directors may direct, for at least two weeks last preceding the day of the meeting. No meeting of the stockholders shall be competent to transact business unless a majority is represented, except to adjourn from day to day, or until such time as

may be deemed proper. At such annual meetings, directors for the ensuing year shall be elected by ballot, to serve for one year, and until their successors are elected. If, however, for want of a quorum, or other cause, a stockholders' meeting shall not be held on the day above named, or should the stockholders fail to complete their election or such other business as may be presented for their
61 consideration, those present may adjourn from day to day until the same shall be accomplished.

Article XIII.

Voting.—All elections must be—ballot, and every stockholder shall have the right to vote, either in person or by proxy, the number of shares standing in his name; but every such person voting, either in person or by proxy or representative, must be a *bona fide* stockholder, having stock in his own name on the stock-books of the corporation at least ten days prior to the election.

Article XIV.

Amendments.—The by-laws may be amended or altered at any meeting of the stockholders by a majority of the stock represented at such meeting, or by a two-thirds vote of the whole number of the board of directors, to be ratified at the first meeting of the stockholders thereafter.

62 *Amendments.*

1. Resolved, That article thirteen be rescinded, and that all persons who are stockholders of this company on the day of election are authorized to vote and be elected directors of the corporation.

San Francisco, *January 4th*, 1881.

Hon. Jas. Grant, *Pres. F. E. Co.*

Dear Sir: The following resolutions were passed this day at the regular meeting of the board of directors of the Fresno Enterprise Company:

Resolved, That the Bank of California, the treasurer of this company, be, and is hereby, instructed to pay only such checks as are signed by the president or vice-president and countersigned by the secretary.

63 Resolved, That all orders for supplies and materials from San Francisco for the company shall be made through the head office in San Francisco, and payment for the same shall be made by checks signed by the president or vice-president and countersigned by the secretary, at the office in San Francisco.

Resolved, That in the absence of the president from the office of the company in San Francisco, the vice-president, in accordance with the by-laws, be, and is hereby, authorized to sign all certificates of stock that are legally issued by the secretary, as well as all papers requiring the signature of the president, if he were present at the office.

Resolved, That in the absence of the president from the mine that the superintendent at the mine be, and is hereby, instructed to draw

drafts on the company at San Francisco for all indebtedness accruing at the mine.

64 Resolved, That no important changes or improvements at the mine or works, involving expense outside of the regular working of the mine and operating the mill, shall be incurred without first being acted upon and approved by the board of directors.

Resolved, That the board of directors shall have the exclusive management and direction of all litigation in which the company is or may hereafter be involved.

Resolved, That the superintendent of the mine be, and is hereby, instructed to comply strictly with the law which requires him to make weekly and monthly sworn statements as to the developments made in the mine, and the progress of the work at both mine and mill.

Resolved, That M. J. Godfellow is hereby discharged and removed as superintendent of the company and its mine, mills,

65 and mining property, and that he is hereby directed to turn over and deliver the books, papers, and property in his custody belonging to the company to William Walsh, who is hereby appointed superintendent in his place & stead.

The directors' meeting was adjourned over until Thursday, the 5th day of January, 1882, at the hour of one o'clock p. m.

[SEAL.] (Signed) W. H. ALLEN, *Secretary.*

Endorsed. Filed March 6, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

66 *Demurrer.*

In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

JAMES GRANT, Complainant, *vs.* GEORGE H. PARKER, Defendant.

Demurrer to Bill of Complaint.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and, for cause of demurrer, showeth that the said

67 complainant hath not, by his said bill, made such a case as entitles him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he

humbly prays to be hence dismissed, with his reasonable costs in this behalf sustained.

WILSON & WILSON,
Solicitors for Defendant.

S. M. WILSON,
Of Counsel for Defendant.

68 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

S. M. WILSON,
Of Counsel for Def't.

UNITED STATES OF AMERICA, }
District of California, } *ss:*

George H. Parker, being duly sworn, deposes and says: That he is the defendant in the above-entitled cause, and that the foregoing demurrer in said cause is not interposed for delay.

GEO. H. PARKER.

Subscribed & sworn to before me, this 29th day of March, 1882.
[SEAL.] E. V. JOICE,
Notary Public.

69 Endorsed: Service of a copy of the within is hereby admitted this 29th day of March, A. D. 1882. Wallace & Hastings, attorneys for complainant. Filed March 29, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

70 *Enrollment.*

At a stated term, to wit, the February term, A. D. 1882, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 8th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

JAMES GRANT *vs.* GEORGE H. PARKER.

The complainant herein filed his bill of complaint, which is hereto annexed, on the sixth day of March, A. D. 1882.

71 Thereupon a subpœna to appear and answer herein was issued, returnable on the first Monday of April, A. D. 1882.

The defendant appeared, by Messrs. Wilson & Wilson, as his solicitors, and, on the 29th day of March, A. D. 1882, a demurrer to said bill of complaint was filed, which demurrer is hereto annexed.

On the 8th day of May, A. D. 1882, a final decree was filed and entered herein, in the words and figures following, to wit:

72 *Decree.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court room in the

city and county of San Francisco, on Monday, the 8th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

JAMES GRANT
vs.
GEORGE H. PARKER. } No. 2732.

The court having denied complainant's motion for an injunction, and dissolved the preliminary restraining order heretofore issued herein, sustained the defendant's demurrer to complainant's
73 bill of complaint; and complainant, not desiring to amend, ordered that said bill be dismissed at complainant's cost.

Thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that complainant's bill herein be, and the same hereby is, dismissed, and that complainant pay defendant his costs in this behalf expended, to be taxed.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Jud'l Circuit.

Endorsed: Filed and entered May 8, 1882. L. S. B. Sawyer, clerk.

74 *Memorandum of Costs and Disbursements.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States of the Ninth Circuit, in and for the District of California.

JAMES GRANT, Plaintiff, *vs.* GEO. H. PARKER, Defendant.

Disbursements.

Marshal's fees	$
Clerk's fees	$37 60
Notary fees—affidavits of Geo. H. Parker, J. E. Bowe, W. F. Myers, Geo. D. Keney, Geo. E. Wood, and W. H. Allen, and affidavit to demurrer—7 affidavits, @ 50c. each	$3 50
Attorneys' docket fee	20 00
Costs taxed at	$61 10

L. S. B. SAWYER, *Clerk.*

75 UNITED STATES OF AMERICA, } *ss:*
District of California, City and County of San Francisco, }

Robert Crockett, being duly sworn, deposes and says: That he is clerk for the attorney for the defendant in the above-entitled cause, and, as such, is better informed relative to the above costs and disbursements than the said defendant. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief; and that the said disbursements have been necessarily incurred in the said cause.

ROB'T CROCKETT.

Subscribed and sworn to before me, this 10th day of May, A. D. 1882.

[SEAL.] E. V. JOICE,
Notary Public.

76 To the plaintiff and Messrs. Wallace & Hastings, his attorneys:

You will please take notice that on Friday, the 12th day of May, A. D. 1882, at the hour of 2 o'clock p. m., we will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such case made and provided.

WILSON & WILSON,
Attorneys for Defendant.

Endorsed: Service of a copy of the within is hereby admitted, this 10th day of May, A. D. 1882. Wallace & Hastings, solicitors for complainant. Filed this 10th day of May, A. D. 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

77 Whereupon said pleadings, final decree, and memorandum of taxed costs are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

[SEAL.] Attest, &c. L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

Endorsed: Enrolled papers. Filed May 8, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

78 *Order Granting an Appeal.*

At a stated term, to wit, the July term, A. D. 1882, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 26th day of July, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

JAMES GRANT *vs.* GEORGE H. PARKER.

On motion of R. B. Wallace, Esq., solicitor for complainant, it is ordered that an appeal from the decree filed and entered in
79 the above-entitled cause on the 8th day of May, A. D. 1882, of the February term, A. D. 1882, of said circuit court, to the Supreme Court of the United States be, and the same is hereby, allowed, and that a certified transcript of the pleadings and proceedings be forthwith transmitted to the Supreme Court of the United States upon the appellant giving a bond in the sum of five hundred dollars.

80 *Bond.*

In the Supreme Court of the United States.

JAMES GRANT, Appellant, *vs.* GEORGE H. PARKER, Appellee.

Know all men by these presents, that we, Robert P. Hastings and William Giselman, are held and firmly bound unto George H. Parker, the above-named appellee, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said George H. Parker, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

81 In witness whereof, we have hereunto set our hands and affixed our seals this twenty-eight day of July, 1882.

The condition of this obligation is such that whereas the above-named James Grant has taken an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States of America of the north judicial circuit, in and for the district of California, entitled James Grant against George H. Parker (number 2732), which said decree was filed and entered of record in said circuit court on the eighth day of May, 1882. Now, therefore, if the above-named James Grant shall prosecute his said appeal to effect and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to re-

82 main in full force and effect.

ROBERT P. HASTINGS. [SEAL.]
WILLIAM GISELMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

Bond.

UNITED STATES OF AMERICA, }
District of California, } *ss:*

Robert P. Hastings and William Giselman, being duly sworn, each for himself, says: That he is a resident and householder within said district of California, and that he is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all his just debts and liabilities.

ROBERT P. HASTINGS.
WILLIAM GISELMAN.

Subscribed and sworn to before me, this 28th day of July, A. D. 1882.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Dist. of Cala.

83 Endorsed: The form of the within bond, and the sufficiency of the sureties thereon, are hereby approved. July 28, 1882. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th judicial circuit. Filed 28 July, 1882. L. S. B. Sawyer, clerk.

84 UNITED STATES OF AMERICA, } ss:
District of California, }

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing eighty-three pages, numbered from 1 to 83, inclusive, contain a full, true, and correct copy of all the pleadings and proceedings in the cause therein entitled on appeal to the Supreme Court of the United States.

Witness my hand and the seal of said circuit court, this 12th day of September, A. D. 1882.

[SEAL.] LORENZO S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE, *Deputy Clerk.*

85 UNITED STATES OF AMERICA, *ss:*

To George H. Parker, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1882, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States, in and for the district of California, in the cause wherein James Grant is appellant and you are respondent, to show cause, if any there be, why the said decree in the said cause mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States, in and for the district of California, this 28th day of July, A. D. 1882, and of the Independence of the United States the 107th.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

86 [Endorsed:] United States Supreme Court. James Grant, appellant, *vs.* George H. Parker, appellee. Citation. Service of a copy of the within citation is hereby admitted this — day of ——, A. D. 1882. A copy of the within citation was left with us this day, the original also being exhibited. July 28, 1882. Wilson & Wilson, sol's for Geo. H. Parker. Filed July 28, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk. Issued 28 July, 1882.

Endorsed on cover: California C. C. U. S. No. 273. James Grant, appellant, *vs.* George H. Parker. Filed 25th September, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 273.

JAMES GRANT, APPELLANT,

vs.

GEORGE H. PARKER.

WRIT OF CERTIORARI AND RETURN.

FILED JANUARY 29, 1885.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the district of California, Greeting:

Whereas, in a certain suit in said circuit court between James Grant, complainant, and George H. Parker, defendant, which suit was removed to the Supreme Court of the United States, by virtue of an appeal agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That the record in this cause is not complete. That there is omitted therefrom an affidavit showing that the amount in controversy exceeds five thousand dollars."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 13th day of January, A. D. 1885.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

In the Circuit Court of the United States, Ninth Circuit, District of California.

JAMES GRANT, Complainant,
vs.
GEORGE H. PARKER, Defendant. } No. 2732.

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, } ss:
United States Circuit Court,
Ninth Circuit, District of California,

R. B. Wallace, being first duly sworn, deposes and says:

That he is a solicitor for complainant in the action above entitled. That the matter in dispute in the above action, exclusive of costs, exceeds, and did exceed at the date of the entry of final judgment in favor of defendant, the value of five thousand (85,000) dollars, and that the reason why this affidavit is made by affiant and not by complainant is that complainant is absent from the city and county of San Francisco, where his solicitors, Wallace & Hastings, reside.

(Signed) R. B. WALLACE.

Subscribed and sworn to before me, this 26th day of July, A. D. 1882.

JOS. F. O'BEIRNE.
Comm'r of U. S. Circuit Court, District of California.

Endorsed: Filed July 26th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify that the foregoing is a full, true, and correct copy of an affidavit showing that the amount in controversy exceeds the sum of five thousand dollars, filed July 26th, 1882, in the therein-entitled cause, and now on file and of record in my office, and that the same constitutes the return to the writ of diminution hereto annexed.

Attest my hand and the seal of said circuit court, this 22d day of January, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk.*

[Endorsed:] Supreme Court U. S. 1884, October Term. No. 273. James Grant, app't, *vs.* George H. Parker. Writ of certiorari and return. Office Supreme Court U. S. Filed Jan. 29, 1885. James H. McKenney, clerk.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

W 273.

OCTOBER TERM, 1884.

JAMES GRANT,
Appellant,

vs.

GEORGE H. PARKER,
Appellee.

Appeal from the Circuit Court for the District of California.

Now comes the appellant, and assigns for error in this cause, that the court below erred in sustaining the demurrer and dismissing the plaintiff's bill.

WHITAKER M. GRANT,
Solicitor for Appellant.

EGBERT, FIDLAR, & CHAMBERS, DAVENPORT, IOWA.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

JAMES GRANT, APPELLANT,

vs.

GEORGE H. PARKER, APELLEE.

FROM THE CIRCUIT COURT OF CALIFORNIA.

STATEMENT OF FACTS and BRIEF FOR APPELLANT.

PLEADINGS.

The plaintiff alleges, that in November, 1880, George H. Parker, agent for J. E. Bowe and others, was engaged in negotiating the sale of a controlling interest in the shares of the Fresno Enterprise Company—a corporation in California owning a gold mine in Fresno county, California—and solicited the petitioner to take a large interest in the property. The petitioner declined, saying he was able to own a mine himself, and that he would not buy an interest in any mine he could not control to the same extent as if he owned it. Parker did not then accede to Grant's terms. The plaintiff was a chemist and metallurgist, and had made a great deal of money by works in Leadville, with his nephew and adopted son. It was a matter of great interest to Parker to enlist Grant in his enterprise, and, without doing so, he was unable to sell a majority of the shares of said stock.

That about the 1st of May, 1881, Parker again approached Grant and solicited him to take an interest in said mine. The petitioner told him he would not take an interest in the best mine in the world, unless he

could control it as if he owned it. To this condition Parker assented, and solicited, on the same day, Robinson to join in the purchase on that condition. Robinson agreed to take as much as $30,000 of the stock; and on the 3d of May, Parker met petitioner at Doolittle's office, in Chicago, with other parties, where Grant's condition was repeated; and among other things, he stated that the laws of California made directors and stockholders of corporations responsible for the acts of their associates, and that one gentleman had declined investing for that reason. Grant said he proposed to protect himself against such laws by retaining control of the property. In all the negotiations, Parker proposed to be a purchaser, with Grant and others, to the amount of $15,000.

At this meeting the following contract was made and executed, that day and the next (see Record, pages 1 to 4, and page 4, for contract):

"CHICAGO, May 3d, 1881.

"*To the Gentlemen who may assent to this Contract:*

"At the request of Geo. H. Parker, who has an offer of the majority of the stock of the Fresno Enterprise mine, in California, and which is offered for sale at $3 per share, the capital being one hundred thousand shares of the par value of $50 per share, I propose, as soon as I can go to Leadville, say the 25th of May, 1881, to examine the said mine personally, and if I conclude to purchase a majority of the shares, I will unite with you in the purchase, and I will take from ten to sixteen thousand shares—$30,000 to $50,000—on my own account. You gentlemen who join me in the purchase can take the balance of a majority of the stock, but there is to be a distinct understanding and agreement that I am to control the management of the mine. And if you gentlemen wish at any time to transfer your interests, you must give me the option of purchasing at your price, or have a stipulation that I am to continue in the management. I stipulate not to sell my interest without giving you a like option.

"[*Signed*] "JAS. GRANT."

On the back of this paper was indorsed —

"James Grant will take $50,000.

"George H. Parker will take $15,000."

And others to the amount of fifty-one thousand shares, or $153,000.

That about the 25th of May, 1884, the petitioner, with Robinson, Parker, and others, examined the mine, concluded to purchase, and met the sellers—John Haley, G. F. Myer, and H. T. Fairbanks—in San Francisco.

That during all the negotiations, Parker, as agent of Bowe and the sellers, represented that none of the shares could be purchased for less than $3 per share; but that Bowe, for himself, or himself and Parker, as soon as it became probable that your petitioner and the Syndicate would purchase, bought of one John Sheehy, unknown to the plaintiff, twenty-one thousand shares, at $1.25 per share. When the petitioner and his party gave notice of the intended purchase, Grant said to the sellers, "Now, gentlemen, if we purchase this stock, it is distinctly understood that the management is to change, and I am to be the manager." To which their spokesman said, "Yes; and we will resign as Directors, and elect such persons as you may name."

The purchase was then concluded, Grant taking seventeen thousand shares, Parker five thousand, and the other parties the balance. On each one of the certificates of stock issued to the purchasers, Parker among the rest, was indorsed, "This certificate is subject to a contract with James Grant, of the 3d of May, 1881." The certificates were all issued to a Trustee, without the name of the real owner in the certificate or books of the company.

In answer to an inquiry by Grant, "Why was this," it was said, "Why, this is to keep people from knowing who are owners." The petitioner, learning this was a direct violation of the laws of California, caused his and the other shares of the Syndicate to be re-issued to the real owners.

On the Wednesday following — being the annual election day — with the approval and vote of the Syndicate and Bowe, Myer, Haley, and Fairbanks, Grant, Robinson, and Parker were elected directors to represent the Syndicate, and Bowe and Myer to represent the minority interest. Grant was elected President and General Manager of the mine; Goodfellow, on his recommendation, Superintendent. An assessment of fifteen cents per share was levied to build a stamp mill. Grant, by written order, directed the Superintendent to build a stamp mill, and Bowe and Parker volunteered to assist him. They practically superseded him [this is the worst printed record the writer has lately seen, "represented" being printed for "superseded"], took charge of everything, altered Grant's plans without consulting him, and, when Grant returned to the mine, volunteered to keep charge of the work, inviting Grant to send Goodfellow to the mine, and Grant to go away and rest himself. This offer was not accepted. Parker, as Bowe's agent, had in the meantime sold to parties east, several thousand shares of the Sheehy stock, at from three to five dollars per share, on the faith of false representations made by Parker of the opinion of J. B. Grant as to the value of the mine. When Parker and Bowe discovered that Grant intended to manage the property, they began to manifest discontent with everything he did.

The petitioner regarded the location of the principal office, at San Francisco, two hundred miles from the property, as a great inconvenience to him, and it required the assent in writing of two-thirds of the stockholders. All the purchasers but Parker assented; he first temporized, and then refused.

During the progress of the work, the petitioner found that the cost of the work far exceeded the estimates furnished him by Bowe and Haley — increaced by Bowe's change of petitioner's plans, and petitioner had to advance large sums to complete the work and keep up prospect work on the mine. For his own convenience, and in full compliance with authority vested in him by the resolutions of the Board of Directors and the by-laws, he ordered the accounts to be kept at the mine, and regularly, with proper vouchers, to be returned to the principal office, in San Francisco. The Vice-President, Myer, contrary to the by-laws, assumed to himself the right to sign checks of the corporation, and issue certificates of stock whenever your petitioner, in discharge of his duties, was out of the city of San Francisco, though by the by-laws the Vice-President

could only act when the President was "unable to act," and in such case he became President, and assumed the whole duties of President.

Your petitioner made a positive order that the Treasurer should pay no checks except those signed by himself, and that no certificates of stock should be issued to a Trustee unless the name of the real owner was inserted in the certificate and placed on the books of the company. This order gave great offense to Bowe and Myer.

About the 22d of September, Parker, who was at the mine, and who had refused a direct application of the petitioner to consent to a transfer of the principal office and give him his proxy, left in company with J. E. Bowe.

On the 24th of September, Bowe, a Director, sold to George H. Parker, a Director, five thousand shares of the Sheehy stock at $1.25 per share, which, through Parker, he had been selling at $5 per share, and which he had withdrawn from the market at that price.

Your petitioner had previously ordered the Secretary to send him a blank check-book, and Bowe, Myer, and Parker, without a Board meeting, countermanded said order.

On the 26th of September, 1881, Parker, acting in concert with Bowe and Myer, addressed a letter to your petitioner (Exhibit A), in which, among other things, he said: "I am surprised at the powers you assume as President and General Manager — first, in delegating authority to the Superintendent to sign checks on the Treasurer; second, ordering the Secretary to send you a check-book, which he is required to keep in his office as part of the records of the company; third, in notifying the Secretary not to issue certificates of stock signed by the Vice-President, when you are absent. In regard to your notice to the bank not to honor checks signed by the Vice-President, you say they will probably follow your instructions, as you furnished the money. I supposed you intended to loan the money as a business transaction, on a rate of interest to be agreed upon, or I should not have allowed a dollar of it to be used. Your course is going to involve us in difficulty, as you are assuming powers to act independent of a Board of Directors, and placing your own construction upon the written agreement of the Syndicate, intimating that I am bound by your interpretation. You assume that I have no interest as a stockholder or Director; that I cannot protect. I cannot assent to your views of my rights under the Syndicate, and have therefore expressed my willingness to meet with the Board of Directors at the regular meeting, on the 5th of October (by a provision of the by-laws), or a special meeting sooner, if you desire to meet your business engagements east. I am in hopes, at such meeting, that we may come to an amicable understanding as to your powers and duties as General Manager and President."

On the same day and mail, your petitioner received from the Secretary a notice of a special meeting, and that he had been ordered by the Directors not to deliver to your petitioner the check-book.

Your petitioner, not knowing that on the 24th of September Bowe had given Parker a bonus of $18,750 on the sale of five thousand shares of stock, on the 28th of September, replied to Parker's letter (Exhibit B, page 13 of Record), in substance as follows:

"I have not delegated authority to the Superintendent to sign checks

on the Bank of California, or the Treasurer. The by-laws of the company make it my duty to sign all certificates of stock, and all contracts and checks, when signed and delivered on contracts. Before that, they are blank pieces of paper. To save the holders of orders of the Superintendent from the trouble of sending them to get checks for them, I authorized the bank to pay them, which I had a right to do, as manager of the property.

"I did order the Secretary to send me a blank check-book, because it was my duty to sign and issue checks, and not his, and I supposed you had sense enough to know—and I do suppose so now—when you have your senses, that a blank check-book is no more a record than this piece of paper, with the heading of the company.

"3. I notified the Secretary not to issue certificates of stock signed by the Vice President when I was able to do it myself. You know the laws require the Secretary to attend the principal office every day, but do not require the President to be there at all, and he is not absent as President when he is not in his office.

"My course will involve no one in difficulty except men who seek to violate their contract with me, which was—that, if I approved, we were to purchase a majority of the stock of this mine with the distinct understanding and agreement that I was to have the control and management of the mine, and if they transferred their stock it was to be subject to that contract. Your name is signed to that paper. I am carrying out its provisions, and the first act I thought proper to be done, to protect my interest and yours, you alone refuse to perform, of the many who signed it. The contract is so plain that it requires no interpretation. To induce me to put three times as much money in this property as you did, you signed that paper, knowing full well that a directory was to be elected to carry out my opinions, and after you have signed the contract, and been elected a Director to fulfil it, you are seeking to evade it. You knew what it meant. I told you—not once, but three times—I would not put a dollar in this mine if I could not control it as if it were my property. I have invaded no right of yours as a stockholder or Director. You are seeking to avoid your contract with me, which gave me the control of this property."

The petitioner avers that in compliance with the Syndicate contract, on the faith of which he purchased his interest in the mine, the Board of Directors, at their first and only full meeting, at which he was elected President, unanimously passed a resolution that the President of this company be appointed the General Manager of the property of this corporation.

When your petitioner received the letter of the defendant, of the 26th of September, 1881, he was acting in strict compliance with the laws of the state and the by-laws of the corporation. A copy of said by-laws—Exhibit C, page 14—is annexed to the bill (Art. 7, page 16), defining the powers of the President, and reads:

"*President.*—The Board of Directors shall, at their first meeting, elect one of their number to act as President, and if at any time the President is unable to act, the Vice-President shall take his place and perform his duties, etc.

"2. He shall sign, as President, all certificates of stock, and all contracts and instruments of writing which have been first approved by the Board of Directors, and affix the corporate seal to all instruments requiring a seal.

"3. He shall call the Directors together whenever he deems it necessary, and shall have, subject to the advice of the Directors, direction of the affairs of the corporation, etc."

When Parker gave the petitioner notice of the meeting referred to, he knew that Robinson, a Director, at Rock Island, could not be notified, and that if he (Parker) attended the meeting, and made a quorum with Bowe and Myer, they could remove your petitioner as General Manager. Every act of your petitioner complained of by Parker was in strict compliance with the laws of California and the by-laws of the company. The petitioner, on receiving Parker's letter of the 26th of September, went to San Francisco and made a written demand of Parker if he intended at the proposed meeting to interfere with the petitioner as General Manager, and, receiving no answer, on the 6th of October he filed a petition in this Court against Myer, Bowe, and Parker, seeking to restrain them from violating the contract with Parker, to the terms of which they, as stockholders, assented. A time was set for hearing, and a preliminary order issued. Bowe, Myer, and Parker all signed an answer that they did not intend at such meeting to interfere with your petitioner as General Manager, and, by consent, the bill was dismissed, and the petitioner supposed any further attempt to interfere with him as Manager, under the contract of the 3d of May, was abandoned. But Parker immediately went to Iowa and Illinois, and sought to induce other members of the Syndicate to violate their contract. He stated to them that he had the opinion of an eminent lawyer of California that the contract of May 3, 1881, was void; that your petitioner was extravagant in his management; that he was habitually violating the laws of California and the by-laws of the company. In December, 1881, he was joined in these representations by J. E. Bowe, and they induced some members of the Syndicate to approve of certain resolutions hereafter referred to, agreeing to submit said resolutions to your petitioner, for approval, before passing them. Parker returned to San Francisco in a clandestine manner, and he and Bowe, instead of presenting said resolutions to the petitioner, as they had agreed, left them at the Secretary's office. The petitioner accidentally saw Parker and Bowe in San Francisco on the 3d of January, and conversed with them about the mine and its business, but neither of them mentioned said resolutions, or any intention of passing them, or of removing the Superintendent at the meeting the next day; and when they met, and the Secretary told them your petitioner was in the city, and asked if he should be notified, they said no; that your petitioner knew it was the regular day for Board meeting.

On the 4th of January, Parker aided and assisted in passing the resolutions (marked Exhibit C, page 18 of Record), all of which were intended to vex and annoy the petitioner in the discharge of his duties, the first four of which were direct violations of the by-laws of the company, and the balance violations of the contract of Parker with your petitioner, except the one in relation to law-suits.

The 1st resolution prohibited the paying of any checks, unless signed by the President or Vice-President, and countersigned by the Secretary, at the office in San Francisco.

The 2d resolution required all orders for supplies and materials from San Francisco, to be made through the head office in San Francisco, and paid for by checks signed by the President or Vice-President, and countersigned by the Secretary at the office in San Francisco.

The 3d resolution authorized the Vice-President, in case of the absence of the President from the office, to sign all certificates of stock that are legally issued by the Secretary, as well as all papers requiring the signature of the President if he were present at the office.

4th. That in the absence of the President at the mine, the Superintendent at the mine should draw drafts on the company at San Francisco for all indebtedness accruing at the mine.

These resolutions were violations of by-law 7 and by-law 10 (see pages 16 and 17), which gave the President alone power to sign contracts and certificates of stock. When the President signed and delivered a check under by-law 7, it completed a contract of the corporation, could be used, and did not require the countersign of the Secretary at San Francisco. The Board had no power under by-law 7 to authorize the Vice-President to sign certificates of stock because the President was not in the office at San Francisco. The President was just as able to act in all such cases as if he was in the office.

Until he was "unable to act," the Board could confer no power on the Vice-President; and when the President was unable to act, the Vice-President, by by-law, and not by the act of the Board, took his place and performed his duties.

The Board had no power under the by-laws to authorize the Superintendent at the mine to draw checks or drafts on the company for indebtedness accruing at the mine. The by-laws gave such powers to the President, and the Board, by resolution, could not change them; the power to do that rested with the stockholders (by-law 14, page 18).

The said Parker, at said meeting, also aided in passing a fifth resolution, that no important changes or improvements at the mine or works, involving expense outside the regular working of the mine and operating the mill, be incurred without being first acted upon and approved by the Board of Directors; and also, without the knowledge of the plaintiff, or advising him thereof, passed a resolution removing Goodfellow as Superintendent, when they knew he was acceptable to the plaintiff.

These acts of Parker were violations of his contract of May 3, 1881, whereby it was distinctly understood and agreed that the petitioner was to control the management. Parker sometimes pretends that he understood the contract differently from what it reads; that proxies given in pursuance of it can be recalled at pleasure; that he is not compelled to give it; that he has, as Director, assumed a trust which he cannot violate; that his contract is void, because a Director or Trustee cannot make such a contract. All of which is mere pretense; the contract was made before he was elected a Director, a position which he voluntarily assumed, and now seeks to make it an excuse for violating a contract made before he was elected. That he, in November, 1882, approached a man of wealth and influence—J. V. Farwell—a holder of five thousand shares of stock,

and said to him, "I want it understood, here and now, that, as a Director in the Fresno Enterprise Company, I propose to manage its affairs according to your wishes."

The plaintiff prays that Parker be restrained from using his power as a Director to violate his contract giving the petitioner the control of the management; that he be restrained, as a director, from attending any meeting to enforce resolutions one, two, three and four; that he be restrained from voting on said five thousand shares issued to him under the contract of May 3, 1881, or any other shares owned by him, at any meeting of stockholders to elect Directors or amend the by-laws, and for other relief (see Record pages 1 to 12, inclusive).

There are many misprints in the record, and they will readily occur to the mind as read, and it is difficult to make a greater abridgment than is here presented.

The defendant demurred to the bill for cause, that the plaintiff had made no such case as entitled him to relief (Record, page 15).

The Court (Record, page 21) refused any preliminary relief, and dismissed the plaintiff's bill; and this decree is appealed from, and the sustaining the demurrer and dismissing the bill the error assigned.

ARGUMENT.

There is no opinion of the reasons of the Court, and we shall argue the case upon the points made, as follows:

1. This contract of the 3d of May, 1881 (Record, page 3), is a valid contract.

We shall admit, to the fullest extent, that a Director in a corporation, or a Trustee of any kind, cannot make a contract which interferes with the free discharge of his trust for his beneficiaries; that he cannot make any contract of advantage to himself or detriment to a trust or duty already assumed.

But this is not the case with this contract. Parker, the defendant, sought to get the plaintiff to purchase an interest in a mining corporation, of which he was not a member, but in the stock of which he proposed to be a joint purchaser with the plaintiff, who was a man of capital, a chemist and metallurgist, and who had been a successful operator in mines and the reduction of ores, at the then largest mining district in the United States.

He tells Parker, not once, but often, that he knew the laws of California, where this mine was situated, would make him individually liable for the debts of the corporation and the mismanagement of its other officers, and that he would have nothing to do with a mine if he could not absolutely control it. He did not stipulate for salary or profit as a manager, but he required control to protect him from fraud or mismanagement. There is not one word or expression in this contract by which the plaintiff sought to benefit himself in the proposed purchase, above the others who joined him, or the minority of the stockholders. There was no trust in him or Parker which prevented their making such a contract. On its face it is just as free from objection as a bargain between A and B to buy a farm, and A, to induce B to join him in the purchase, agrees that B shall manage it.

The first cause to which we invite the attention of the Court, is *Faulds* vs. *Yates, etc.*, 57 Illinois, page 416:

"Three persons owning a majority of the stock of an incorporated company for the purpose of mining coal upon their lands, and having leased the premises, formed a partnership for the prosecution of their business, entered into an agreement, as between themselves, that they would determine among themselves as to its officers and management, and that, if they could not agree, they would ballot among themselves for the Directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election. Held, this agreement was not void as against public policy; the persons owning a majority of the stock had a right to combine, and thus secure the Board of Directors and the management of the property."

(Page 420.) "There was no fraud in the agreement. There was nothing unlawful in it. There was nothing which necessarily affected the rights of the minority. Three persons owning a majority of the stock had an unquestioned right to combine, and thus secure the Board of Directors and management of the property. Corporations are governed by the republican principle that the whole are bound by the acts of the majority when the acts conform to the laws of their creation."

(Page 421.) "Incompetent or unfriendly Directors might involve them in much trouble, heavy expense, and useless litigation. It is strange that a man cannot, for honest purposes, unite with others to protect and secure his rights and property, without liability to a charge of fraud and iniquity. This agreement was made between persons who had a large amount of capital in an enterprise somewhat perilous. The transactions which Fauld, through his counsel, denounced as fraudulent and nefarious, was conceived and consummated by him as much as by his partners. Every motive which could influence a man for good, should have prompted him to silence."

Havemyer vs. *Havemyer*, 11, Jones & Spencer, New York, Superior Court, 506.

"An agreement between divers stockholders of a corporation, who together own a majority of the shares of a corporation, entered into for the purpose of electing Directors, who would manage the affairs of the company in the interest of the stockholders, and thus improve the value of the stock, is not in conflict with the requirements of law, and in no wise derogates from its policy. There is nothing in it that tends to frustrate or interfere with the legal right of a majority of the stockholders to delegate to Directors of its own choice the management of the affairs of the company."

Lorillard vs. *Clyde et al.*, 86 New York, Court of Appeals, 384.

"An agreement will not be judged illegal when it is capable of a construction which will uphold it."

Plaintiffs and defendants, rival common carriers, agreed to consolidate their capital and form a corporation — each to contribute one-half the stock. Defendants were to manage the corporation and business in good faith and with economy, and to receive usual commissions. In consideration whereof they guaranteed plaintiffs seven per cent dividend. There were no dividends. Plaintiffs sought to recover on the guaranty. Defendants demurred, claiming the agreement to be illegal; held un-

tenable. It was also claimed that the agreement vesting the management in respondents was against public policy, as it attempted to provide in advance for the control of the corporate affairs, and so withdrew it from the trustees and stockholders; held untenable, as the agreement was between the parties who contributed the entire capital, and provided for good faith in the management.

There are no authorities, when properly considered, that conflict with the cases above cited. There are many that agreements between directors and outsiders, or between stockholders or purchasers, who stipulate for undue advantages to themselves, are against public policy and void, but none that agreements between persons who wish to embark in such enterprises, and stipulate for a particular management, are against any public policy.

2. If we are right in the proposition that this was a valid contract, was there a breach, or an intended breach of the same, by Parker?

It was the duty of Parker under this contract he could only perform by using his stock to give the plaintiff the control of the management. The agreement contemplates that the property was a corporation managed by Directors. It was equivalent to a proxy or obligation to vote for Directors who would carry out the agreement. Parker refused as a stockholder to assent to a change of location of the office, which was necessary for economic management.

It was an agreement tantamount to an irrevocable proxy, which is not contrary to public policy.

Brown vs. *Pacific Mail Steamship Company*, 5 Blatchford, 525.

As this case is pertinent upon the next point we shall make, we cite it here.

"In order to deprive a court of the United States of jurisdiction in equity, because the remedy at law is plain, adequate, and complete, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity."

The defendant violates this contract by giving power to the Vice-President, which he was not authorized to do under the by-laws.

The first four resolutions of the 4th of January, 1882 (see Record, page 1849) violate the by-laws of the company. The by-laws (7 and 10) authorize the President alone to sign contracts (checks) and certificates of stock; they make the President, subject to the advice of the Directors, director of the affairs of the corporation; they authorize the Board of Directors to elect a Vice-President, but the Vice-President has no power to assume the duties of President unless the latter is "unable to act."

The resolutions authorize the Vice-President to assume the duties of President — not when he is unable to act, but when he happens to be out of the office. He might be in the street; in another room; at the mine; in the city — yet he would be perfectly able to act.

The Vice-President can only assume the duties of President as the by-laws, and not the Directors, authorize.

It is a part of the history of mining corporations in America that Directors treat such property as their own, regardless of the rights of the stockholders, the real owners. They elevate or depress the stock, as they please. They conceal, in violation of law, the names of the stock-

holders. If all the money taken from the Comstock mines — nearly four hundred millions — was divided among the victims of the fraudulent conduct of their managers, it would not be enough to buy each one a decent breakfast. While we admit that the Court cannot interfere with Directors in the exercise of their discretion within the limits of their powers, courts of equity find ample jurisdiction, and, within modern experience, very quick cause, to exercise their restraining power over them. In the case at bar, the Board could have removed the plaintiff as President, and elected another, and he could not come into this Court against Parker in that capacity; but when, instead of removing him, the defendant conspires to violate the by-laws to deprive him of his functions, he places his fraudulent conduct within the reach of this Court.

Resolutions five and six were direct violations of Parker's contract with Grant. They removed his Superintendent without notice, and prohibited him from making any changes or additions to the work, except by order of the Board.

That the Directors had a right to do. But Parker made a contract with Grant, before he was a Director, to induce him to invest large moneys in this property, that Grant was to manage the property. He says, by his demurrer, "I admit the contract. I admit the violation; but a court cannot protect you, because I violate my contract under color of a trust I have assumed as a Director." If Parker was amenable to the jurisdiction of the court for a breach of this contract at the time he made it, there is no "device, no shifting place" for him to shield his fraudulent act under the authority of a trust assumed after he had made a contract.

"The transaction," says the 57th Illinois (page 421), "was fraudulent and nefarious, was conceived and consummated by him, and every motive which could influence a man for good should have prompted his silence. The plaintiff, in this part of the transaction, reaches him by principle of equity, from which he cannot escape under any plea of duty he owes to a trust which he assumed after he made the contract. He comes here by his demurrer, and alleges his own turpitude. No court will find an excuse for such a plea. A court of equity could reach him under this contract if he were not a Director. He cannot voluntarily put himself in a position for a violation of a contract with the plaintiff by assuming a trust as to other parties.

Lastly: We are advised that the Court below was of opinion that the plaintiff's remedy was at law.

This was a grievous error.

No court of law can give the plaintiff an adequate remedy in damages for depriving him of the supervision of property. It was his personal knowledge, experience, integrity, judgment, and discretion; his personal protection from fraud and mismanagement; his protection from indefinite and countless liabilities, that caused him to require the management of this property. No damages could compensate him for that. Fraudulent steals by Secretaries, fraudulent issues of stock, incompetent management — so loose and indefinite as not to be a matter of calculation — might not only ruin his stock, but subject him to pay for the fraudulent acts of others. Reverse this case and send it back, and

he will prove what has actually happened. A fraudulent Secretary and a confiding Vice-President have enabled the former to steal nearly $5,000, and the plaintiff is liable to the stockholders for that amount. An incompetent and ignorant Superintendent, and a more incompetent mill-man, appointed by a purchased Directors' vote, lost to the corporation $100,000 in a single year. The mine was gutted and sent to ruin, and the plaintiff had no remedy.

We say a purchased Director. We mean what we say. Two days after Parker purchased or received from Bowe five thousand shares of stock, at one-fourth its market price, Parker gives notice to the plaintiff that he intends to violate his contract. The reasons he assigned were as false as the fraud he intended to consummate.

WHITAKER M. GRANT,
For Appellant.

115-51

FILED
MAR 17 1885
JAMES R. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NO. 273.

JAMES GRANT, *Appellant*,

vs.

GEORGE H. PARKER, *Appellee*.

PHILADELPHIA LAW ASSOCIATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLEE.

JOHN N. ROGERS,
~~For~~ COUNSEL.

he will prove what has actually happened. A fraudulent Secretary and a confiding Vice-President have enabled the former to steal nearly $5,000, and the plaintiff is liable to the stockholders for that amount. An incompetent and ignorant Superintendent, and a more incompetent mill-man, appointed by a purchased Directors' vote, lost to the corporation $100,000 in a single year. The mine was gutted and sent to ruin, and the plaintiff had no remedy.

We say a purchased Director. We mean what we say. Two days after Parker purchased or received from Bowe five thousand shares of stock, at one-fourth its market price, Parker gives notice to the plaintiff that he intends to violate his contract. The reasons he assigned were as false as the fraud he intended to consummate.

WHITAKER M. GRANT,
For Appellant.

115-51

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NO. 273.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLEE.

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Supreme Court of the United States.

October Term, 1884.

JAMES GRANT,
Appellant,
vs.
GEORGE H. PARKER,
Appellee.
} No. 273. In Equity.

BRIEF FOR THE APPELLEE.

This appeal is taken from a decree dismissing the appellant's bill, on demurrer, for want of equity. (Record, pp. 19—22.) For the bill and exhibits annexed thereto, see pages 1—19 of the record. It is also set forth nearly at length in the appellant's brief.

The bill appears to us to be incumbered with a good deal of redundant matter. The substance of its allegations, when sifted, seems to be as follows, viz :

That, in the spring of 1881, the defendant, Parker, was agent for the holders of a majority of the capital stock of the "Fresno Enterprise Company," a California mining corporation, to sell their stock. That through his influence and procurement, the complainant, Grant, and a number of other persons residing at Davenport, Iowa, and Chicago, Illinois, were induced to make purchases of said stock, amounting in all to 51,000 shares, at $3 per share, (the whole number of shares being 100,000,) said Grant taking 17,000 shares, and said Parker 5,660 shares. That this stock was purchased under a mutual agreement, in writing, among all the said purchasers, (who are called a "syndicate" in the bill,) contemplating the acquisition by them of a majority of the whole stock, and a controlling interest in the company, and providing that the complainant, Grant, should "control the management of the mine." (Record, p. 3.) That the purchases having been consummated, and the stock transferred to the re-

spective purchasers, at the annual election of the company in May, 1881, Grant, Parker, and Robinson, members of the "syndicate," and two other persons not members thereof, were elected directors; and Grant was by the directors elected president, and appointed "general manager of the mine." (p. 5.) After detailing certain differences which arose between complainant, on the one side, and Parker and other directors on the other, as to the propriety of the complainant's management, and correspondence between the complainant and Parker on that subject, and various other matters not specially material, (pp. 5-10,) the *gravamen* of the appellant's complaint is at length disclosed, in the adoption of certain resolutions by the board of directors, Jan. 4, 1882, said Parker being alleged to have "aided and assisted in their adoption." (Record, pp. 10, 11.) For a full copy of these resolutions, see record, pp. 18 and 19. They give certain directions as to the mode of conducting the company's business, remove the superintendent then in office, and appoint another in his place. These resolutions are claimed by the appellant to be, in part, in conflict with certain by-laws of the company; but especially to interfere with his rights under the agreement between the members of the "syndicate," that the appellant should "control the management of the mine," (pp. 10, 11).

The prayer of the bill is, that Parker (who is sole defendant) be enjoined from "using his power as a director, to violate his contract with your petitioner, giving him the control of said mining property;" from "attending any meeting of the board of directors to enforce resolutions one, two, three and four, of Jan. 4th;" and from "voting on said 5,660 shares of stock, issued to him under the contract of May 3, 1881, or any other shares of stock owned by him, at any meeting of stockholders for electing directors or amending the by-laws," etc. (p. 12).

One allegation of the bill (probably not a material one) is a little improved upon in the statement thereof in the opposite brief.

In the *latter*, (p. 1,) the complainant is described as "a chemist, and metallurgist." The statement of the bill is, (record p. 2,)

that after his first interviews with the defendant, the complainant "left Davenport, and passed the winter in Boston, at the Mass. School of Technology, studying chemistry and metallurgy of mines." The court will thus become advised that our learned and eminent friend, (who has so often appeared in this court in another capacity than that of a party litigant,) after a long and honorable career at the bar, the substantial fruits of which are seen in that "large estate" which qualifies him "to own a mine himself," (record p. 2,) instead of retiring to enjoy the *otium cum dignitate* which he has so well earned, has sought and found new fields of enterprise and research for his untiring energies. It also appears, that in emulation of the elder Cato, who began the study of Greek at the age of eighty, our learned friend has repaired to the American Athens, and there pursued, with the zeal and enthusiasm of youth, the paths of scientific study in her halls of learning. But the court will, we trust, be gratified to notice, that still preserving his wonted kindly regard for his brethren of the bar, our learned friend continues to make his new field of activity tributary to their advantage, by furnishing material for forensic debate, and judicial decision. To no motive less disinterested than this, we are persuaded, can the present appeal be reasonably ascribed.

The bill in this case, we submit, may be accurately described as a bill by a corporate stockholder, who is also a director and president, against another stockholder and director, to enjoin the defendant from taking any action in either capacity, to prevent the plaintiff from exercising an absolute control over the business of the corporation, "as if it were his own;" on the strength of a private agreement among the holders of a majority of the stock, including plaintiff and defendant, providing that the plaintiff should "control the management of the mine."

Louis the Fourteenth tersely and comprehensively defined his position in the government of France in these words: "I am the State." Emulating this royal example, the complainant by this bill says, in substance, "I am the corporation," and asks the court so to decree. He contends, in effect, that by this

agreement he is constituted the autocrat of the corporation; that the board of directors are reduced to the position of mere puppets, with no power save to register his decrees; and that a court of equity will enforce this agreement by injunction, regardless, alike of the rights and interests of nearly one-half of the stockholders, not included in the so-called "syndicate" (commonly and less daintily called a "ring",) of the rules of law, by which the government and control of such corporations is vested in the board of directors, as the representatives and trustees of *all* the shareholders; and of the very by-laws of this company, annexed to and made a part of the bill (record p. 15).

By these by-laws, the directors are empowered (Art. IV, Sub-div. 2, 3) "to appoint and remove at pleasure all agents and employees of the corporation, prescribe their duties, fix their compensation, and require from them security for faithful service. To conduct, manage, and control the affairs and business of the corporation, and to make rules and regulations, not inconsistent with the laws of California and the by-laws of this corporation, for the guidance of the officers, and the management of the affairs of the corporation," (Art. V, Sub-div. 3.) "To supervise all officers, agents and employes, and see that their duties are properly performed."

It is presumed that the organic law of the corporation would invest the directors, from the very nature of their office, with substantially the same powers and duties.

It is submitted that the decree below is clearly right, and should be affirmed.

1st. The written agreement between the plaintiff and his fellows in the "syndicate," that plaintiff should "control the management of the mine," (record p. 3,) cannot be construed to intend the absolute and autocratic control, "as if it were his own," claimed by the plaintiff. No such absolute power could lawfully be vested in the complainant alone; and the agreement should be construed reasonably, and so as to make it harmonize with the rules of law and the by-laws of the company. It should be

held to contemplate such a management and control of the mine, as could properly be confided to an executive officer, subject, and not superior, to the general supervision and control of the board of directors. This agreement was satisfied by the appointment of the complainant as "general manager of the mine" (record p. 5). But a "general manager," or chief executive officer (by whatever name called) of a business corporation, is not, and cannot properly be, invested with absolute and unlimited powers. He is subject to the oversight and direction of the board of directors. They alone are chosen directly by the shareholders, and represent them; and they appoint the executive officers, who are responsible to, and removeable by them; and it is so expressly provided in the by-laws of this corporation (record, p. 16, Art. VI.)

The prior oral conversations between plaintiff and defendant, in which plaintiff said he would not engage in the enterprise, unless he could control the mine "as if it were his own," (record, p. 2,) cannot be allowed to modify or interpret the subsequent written agreement, to which alone all the members of the "syndicate" assented, and which by a familiar rule superseded and merged all previous oral negotiations on the subject.

2d. But if the stipulation that the plaintiff shall "control the management of the mine" is to be understood as meaning to vest in him the absolute and unlimited powers contended for, it is in direct conflict with the organic law of the corporation, with the by-laws set forth in the bill, and with public policy. It is not in the power of the holders of a mere majority of the corporate stock, by a private agreement among themselves as individuals, to deprive the directors of their lawful control, and make the will of a single person omnipotent in the corporate affairs. This seems to us so plain as not to require argument. None of the decisions cited by the appellant, pp. 9, 10, will be found to sustain the contrary view. In Faulds vs. Yates, 57 Ill., 416, and Havemyer vs. Havemyer, 11 J. and S., (N. Y. Superior Ct.) 506, the agreements in question were merely for a combination

among the holders of a majority of the stock, in the election of directors. Inasmuch as the majority of the stockholders have the right to control such election, it was said not to be illegal for them to agree, in advance, to combine for that purpose. Such an agreement contemplates the control of the corporate affairs, in the legitimate way, and through the agencies in whom the controlling power is vested by the charter or organic law of the body. It differs widely from an agreement to convert the directors into puppets, and set up a dictator in their place.

In Lorillard vs. Clyde, 86 N. Y., 384, the plaintiff and defendants agreed to organize a corporation for the purpose of consolidating their business as carriers. They alone were to constitute the corporation and to contribute equally, as between themselves, the entire capital stock. It was on this ground that the stipulation that defendants should have the management of the corporate business was held to be legal; the court saying, (p. 389) "An agreement providing for the details of management, made in advance, *might not be binding upon the trustees* of the corporation when organized, but such an agreement is not illegal."

The suit was not for specific performance, by enjoining the officers of the corporation from interfering with the management thus in advance agreed on, but was at law, upon a guaranty to plaintiff of dividends to a certain amount, embraced in the contract; which guaranty was held not to be vitiated by the said agreement for management by the defendants, as being an illegal consideration for the guaranty.

On the other hand: in Fremont vs. Stone, 42 Barb., 169, defendants had agreed with plaintiff, that on payment by him of $200,000, for a certain number of shares of the capital stock of a railway company, then owned by defendants, they would procure new directors, to be nominated by plaintiff and his co-purchaser, H., to be substituted in the place of all the directors, other than plaintiff and H. It was held that this contract was an attempt improperly to interfere with the rights of the other

stockholders, and was against public policy; and specific performance thereof was refused.

And in Guernsey vs. Cook, 120 Mass., 501, S.C., 117 Mass. 548, a contract by which a shareholder in a corporation, acting for holders of a majority of the stock, in consideration of the purchase of a part of such stock at a price named, ageed to secure to the purchaser the office of treasurer of the corporation, with a fixed salary, and in case of his removal to repurchase the stock at par, was held void as against public policy, and as a fraud on the other stockholders. The court say: "It was the purpose and effect of the contract to influence the defendant in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed under direct inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates."

3d. But whether the agreement for giving plaintiff control of the corporation be, or be not legal, as between the individuals who assented thereto, it is not an agreement which equity will specifically enforce, by restraining the action of the defendant in his capacity of *director of the corporation*. The bill asks that defendant be *enjoined from attending, and voting at* meetings of the directors, for the purpose of carrying into effect the resolutions adopted by them. It seeks directly to control the defendant's action, in his representative and trust capacity, by virtue of an agreement made by him as an individual. No such remedy as this, we submit, can be granted, whether the defendant be liable personally on the agreement, or not. No case cited by appellant recognizes the right to *specific performance* of such contracts as were there held not to be tainted with illegality. The impropriety of such a remedy is enhanced by the fact, that though the relief asked directly affects the interests of the corporation and of the other stockholders, neither the corporation

nor any other stockholder is made a party. Neither are the other directors made parties.

The appellant argues, (p. 11,) that since defendant entered into the contract before he became a director, he cannot escape responsibility for its violation, by reason of his afterwards taking upon himself that office. This argument, whether sound or not, would at least be *relevant*, in an action against Parker in his private capacity, for damages for violation of the contract. But to the present suit, brought directly to control Parker's action as a director, we submit that it is totally inapplicable.

4th. It is insisted by the appellant, (p. 10,) that some of the resolutions of the directors of which he complains, authorizing the vice-president to sign checks, certificates of stock, etc., in the absence of the president, are in conflict with the by-laws. We do not see that any such conflict is made out, but if it exists, this suit is not the appropriate remedy. The resolutions are either valid or void. If void, they may be disregarded in practice; but this will not entitle the president to maintain, in his own name, a suit in equity against *one* member of the board of directors who adopted them, to enjoin him from attending or voting at any meeting of the directors "to enforce" the resolutions; and that, without alleging that any particular enforcement is threatened or intended. The remedy by injunction, if available at all, would be more appropriately directed against the vice-president, if he should attempt to usurp the functions of the president, under color of authority conferred by these resolutions.

The learned appellant seems to urge this appeal seriously and in good faith. The unfeigned respect and regard which we feel for him has led us to treat it accordingly. We submit, however, that it can in no wise be sustained, and that the decree below must be affirmed with costs.

JOHN N. ROGERS,
of Counsel for Appellee.

THE SUPREME COURT OF THE UNITED STATES:—In Equity.

MORRIS RICHTER,
Complainant,
vs.
The Union Trust Company, of New York, George Jerome, Survivor of George Jerome and Fernando C. Beaman, Assignees in Bankruptcy, of the Lake Superior Ship Canal Railroad & Iron Company, Josephine Ayer, Leslie Josephine E. Ayer, Henry Ayer, Frederick F. Ayer and Frederick F. Ayer, Benjamin Dean and Jacob Rogers, Trustees under the Will of James C. Ayer, Deceased.

STATE OF MICHIGAN,
Eastern District of Michigan, } ss.
County of Wayne.

Morris Richter, being duly sworn, doth depose and say, that this deponent is the complainant in the above entitled cause; that the bill of complaint in said cause was filed with the clerk of the Circuit Court of the United States, for the Northern Division of the Western District of Michigan, in equity, at Marquette, in the State of Michigan, on the 17th day of July, 1882, by this deponent, as complainant, against the above named defendants as defendants; that said bill

has been taken regularly as confessed against the defendant, the Union Trust Company of New York, and that the other defendants, although they have appeared to, yet they have not answered said bill, but have put in a demurrer thereto. That the demurrer in said cause has been heard before the Hon. S. L. Withey, District Judge acting as the Circuit Judge for the said court, and upon said hearing, after consideration, the bill of complaint was ordered to be dismissed; said demurrer being sustained by the said Circuit Judge. That an appeal in said cause has been duly taken by this deponent and the cause is now on the docket of this court awaiting hearing in due course, and will be as deponent believes, number 882 on said docket for the next term of this court. That, as deponent believes, the cause cannot be reached for hearing until the lapse of at least two or three years from the present date. That the witnesses of deponent by whom he expects to make the case stated in his bill, a copy of which is now on file in the return of the clerk of said Marquette Circuit, to this court; are aged and infirm, and reside at a great distance most of them more than 500 miles from the place of trial of said cause, and several of them are single witnesses to material facts in the cause, which facts can severally, only be proved by the several witnesses as hereinafter stated, according to deponent's knowledge and belief.

That Francis W. Anthony is one of said witnesses and is upwards of 65 years of age, as deponent is informed and believes, and resides in the Northern Peninsula of Michigan, and is a witness by whom deponent expects to prove that he, the said Francis W. Anthony, in connection with the directors of the corporation,

then known as the Portage Lake and Lake Superior Ship Canal Company, assisted and abetted the plan alleged in complainant's said bill, of organising the corporation known as the Lake Superior Ship Canal Railroad and Iron Company, and in putting upon the market $1,300,000 of its coupon bonds, purporting to be secured by mortgage of the fee of 200,000 acres of land in the Upper Penisula of Michigan, known as the Wagon Road lands (as more particularly stated in said bill of complaint), when, in fact, the said Lake Superior Ship Canal Railroad and Iron Company had a legal title only to 47,000 acres of said land, and an equitable title by contract of purchase from the State of Michigan to 153,000 acres thereof. That the said Francis W. Anthony received the money, the products of the sale of said bonds so put upon the market and sold to bona fide purchasers, and subsequently colluded with James C. Ayer, predecessor of defendants (who claim under him as volunteers in this case) to procure the legal title to 150,000 acres of the said lands (thus purporting to have been mortgaged, as security for said bonds), from the State of Michigan, which then held said title; and that the said James C. Ayer had full knowledge of the facts that the said Anthony had procured the said bonds to be put upon the market, and had obtained the money thereon of bona fide purchasers of said bonds upon the representation of a legal title of the said 153,000 acres of land in the said Lake Superior Ship Canal Railroad and Iron Company. That the said Anthony is the only witness to the aforesaid facts and knows all of the actings and doings of said Anthony in the premises. That, as deponent believes, there is danger that the said An-

thony, by reason of his advanced age, may decease before this cause can be reached in its regular order and heard, in case of its being sent back for trial upon the merits, before the same can be gotten ready for trial and brought to a hearing in due course of practice.

That William L. Avery, who resides at Mt. Clemens, in the State of Michigan, is also a material witness for this deponent in the said cause. That the said William L. Avery is upwards of 70 years of age, and this deponent is advised by his counsel, after stating the facts which deponent expects to prove by him, that the said Avery is a material witness for deponent in said cause; without his testimony deponent cannot safely go to hearing in said cause. That said Avery is a single witness and the only witness to material facts alleged in said cause, to wit: to the facts alleged in said bill of complaint with regard to the proceedings of the directors of the Portage Lake and Lake Superior Ship Canal Company in manipulating and executing the scheme alleged in said bill for putting the bonds of the last named company upon the market and in procuring money from the bondholders thereon, on the representation that said bonds were secured by a mortgage of the legal title of 200,000 acres of the Wagon Road lands, hereinbefore mentioned, when in fact the said company had only an equitable title thereto as hereinbefore stated. That the said William L. Avery was one of said directors and the only one who, to deponent's knowledge, has full cognizance of all the facts relating to said transaction and the negotiations of said Portage Lake and Lake Superior Ship Canal Company with the said Anthony and the facts and proceedings which resulted

in putting upon the market the bonds aforesaid purporting to be secured by legal title, when, in fact, they were only secured by an equitable title to said lands.

That said Avery is also a material witness to prove the negotiations of said directors, the said Portage Lake & Lake Superior Ship Canal Company, with the late James C. Ayer and other capitalists to whom the said Ayer recommended the said directors for further capital to bring the canal and railroad enterprises to a successful conclusion after said bonds had been placed on the market as hereinbefore stated. That as deponent is informed and believes the said Avery knows the facts that the said James C. Ayer had full notice from the said directors of the condition of the said securities, as stated in complainant's bill when he entered the syndicate as a member thereof with said Davis, as mentioned and set forth in said bill, and laid the plan to obtain the legal title from the State of Michigan under the said Anthony's contract with said State, with full notice of said Anthony's relations to said directors and to the said Wagon Road contract.

Deponent avers that there is danger that the evidence of said Avery may be lost before this case can be brought to a hearing in accordance with the regular practice of this Court unless his testimony is taken *de bene esse.*

Deponent further says that Samuel L. Smith, who resides in Lansing, in the State of Michigan, is also a material witness for this deponent in said cause, as this deponent is advised by his said counsel, after stating the facts which deponent expects to prove by said Smith in said cause, which this deponent verily believes

to be true, and that said Smith is a single and only witness to material facts in said cause, without proof of which, as deponent is informed by his counsel and ver ily believes, he cannot safely go to trial.

Deponent expects to prove by said Smith the facts relating to the negotiations, and the arrangements alleged in said bill between James C. Ayer, deceased, and Schuyler F. Seager, through which said Ayer (through the agency of said Seager) procured the title to 153,000 acres of land from the State of Michigan as in said bill alleged. That deponent is informed and believes that said Smith was interested with said Seager in assisting said Ayer to procure said title from the State of Michigan under said Anthony's contract, and with means furnished by said Ayer, did procure said legal title under said contract from the State of Michigan, with full notice of the equitable lien of the bonds, which are represented by the complainant's bill. That said Seager and James C. Ayer are both deceased and said Smith is the only witness to said transactions known to deponent.

Deponent further says that Alfred Russel, who resides in Detroit, Michigan, in also a material witness for deponent in said cause and is a single witness and the only witness to many material facts to complainant's case therein and which deponent expects to prove by said Russel. That deponent expects to prove by said Russel that he was employed and paid by the syndicate of which the said James C. Ayer, under whom the defendants claim, was a member, and that the said Russel managed said cause in the name of the Union Trust Company of New York the plaintiff therein, in the interest of said Ayer, and of said

syndicate, in violation of the duty of the said trustee to the bondholders, as more particularly alleged and stated in said bill of complaint on file in this cause, and thereby procured for said Ayer the adverse claim of title which is the subject of litigation by deponent's said bill.

That deponent has fully and fairly stated the facts which he expects to prove by each of said witnesses, to his counsel, Joseph P. Whittemore, who is solicitor for the complainant in this cause, and is advised by said counsel after full statement of the facts which he thus expects to prove by each of said witnesses, that the testimony of each of said witnesses is material, and that deponent cannot safely proceed to trial without their testimony respectively, as hereinbefore stated, which advice, given after such statement as aforesaid, deponent verily believes to be true and correct.

That deponent has applied to the Hon. S. L. Withey, under the provisions of equity rule 70, of the Circuit Court, for a commission to issue in this cause, to take the deposition of said witnesses upon the statement of the facts aforesaid, which application the said judge has denied, because of doubts expressed by said judge of his power to grant said commission, after said bill was dismissed and the case appealed.

Wherefore, deponent is advised and applies accordingly to this court for relief in the premises, and that a commission may issue in this cause to take the examination *de bene esse* of the said witnesses respectively. That any proceeding by bill in equity to perpetuate the testimony of said witnesses seems impracticable, for the reason that the defendants in

said cause reside in different States, and all reside out of the District in which the property which is stated in the bill of complaint in this cause is situated, to-wit: some of the defendants reside in the State of Mass., others in the State of New York, and others in the Eestern District of Michigan, and none of them in the District in which the land lies, upon which the mortgage which is sought to be foreclosed in this cause as an equitable mortgage, is claimed to be an equitable lien, and no single bill which could be filed would authorize any court in either District where the defendants respectively reside, to grant the relief of perpetuating thn testimony aforesaid. Wherefore, this deponent is advised to apply to this court for that relief, which the power to make rule 70 for the guidance of the Circuit Courts in such cases, necessarily implies the power to grant.

Deponent further says that Charles Flowers, who resides in the City of Detroit, is a reputable attorney, practicing law in said City, and is in no wise interested for any of the parties in this cause, nor of counsel for nor of kin to any of them; that he has formerly officiated as stenographer in the Circuit and District courts of the United States, for the Eastern District of Michigan, and has acted as Commissioner of the District Court for the county of Wayne for several years, and is in every way qualified to act as the commissioner in this case, to take the examinations in this cause: wherefore, deponent prays that by the direction of this court, the Clerk of the Circuit Court aforesaid, may be authorized and directed to issue a commission to the said Charles Flowers, to take the testimony of the aforesaid witnesses respectively, upon notice (to be

prescribed by the order of this court) to be given to Messrs. Meddaugh, Driggs & Harmon, who reside in Detroit, and who are the solicitors who have interposed said demurrer, and appear for all the defendants other than the Union Trust Company aforesaid in said cause MORRIS RICHTER.

Subscribed and sworn to before me this 8th day of April, A. D. 1885. JNO. GRAVES,
U. S. Circ't Ct. Com'r,
Eastern Dist. of Michigan.

THE SUPREME COURT OF THE UNITED STATES:—IN EQUITY.

MORRIS RICHTER,
Complainant,
vs.
THE UNION TRUST COMPANY, of New York, GEORGE JEROME, Survivor of GEORGE JEROME and FERNANDO C. BEAMAN, Assignees in Bankruptcy, of the Lake Superior Ship Canal Railroad & Iron Company, JOSEPHINE AYER, LESLIE JOSEPHINE E. AYER, HENRY AYER, FREDERICK F. AYER and FREDERICK F. AYER, BENJAMIN DEAN and JACOB ROGERS, Trustees under the Will of JAMES C. AYER, Deceased,
Defendants.

To Messrs. Meddaugh, Driggs & Harmon,

Solicitors of and of counsel for the defendants in the above cause:

Take notice, that on the foregoing affidavit and upon the return of the clerk of the Circuit Court of the